**What are the Income Tax Consequences of Maintenance and Child Support Payments?**

**TAX ASPECTS OF MAINTENANCE and SUPPORT**

**1. ALIMONY, SEPARATE MAINTENANCE PAYMENTS AND CHILD SUPPORT**

**On July 18, 1984, the Domestic Relations Tax Reform Act of 1984 was enacted [PL. 98-369]. Section 422, of the act, entitled "Tax Treatment of Alimony and Separate Maintenance Payments" amended Sections 71 and 215 of the Internal Revenue Code. This amendment continued the general rule that the gross income of a taxpayer includes amounts received as alimony or separate maintenance payments,[IRC Section 71(a)] and that an amount equal to such payments shall be deductible by the payor. [IRC Section 215(a).]**

**Prior to the 1984 Act, a payment qualified as alimony or separate maintenance if it met several requirements. The payment was required to be in discharge of a legal obligation imposed by a family or marital relationship. The payment was required to be made under a decree of divorce or separate maintenance, a written separation agreement, or a decree of support or maintenance. The payment was required to be "periodic" as defined in 1.71-1(d) of the regulations. In addition, payments which were fixed as child support were not treated as alimony.**

**Under Section 422 of the 1984 Act, alimony and separate maintenance payments under a decree of divorce or separate maintenance or a written instrument [IRC Section 71(b)(1)(A).] incident to such a decree, [IRC Section 71(b)(2)(A)] a written separation agreement,[IRC Section 71(b)(2)(B)] or a decree requiring a support or separate maintenance [IRC Section 71(b)(2)(C)] continue to be deductible by the payor and includible in the income of the payee. However, the 1984 Act provides a new definition of alimony and separate maintenance payments. Such payments no longer must be made on account of a family or marital relationship, nor must they be "periodic". Instead, if six requirements are met, a payment received by, or on behalf of, the payee spouse (or former spouse) will qualify as an alimony or separate maintenance payment. (1) The payment must be in cash. (2) The payment must not be designated as a payment which is nondeductible by the payor and nonincludible in income by the payee. [IRC Section 71(b)(1)(B)]. (3) If the parties are separated under a decree of divorce or legal separation, they must not be members of the same household [IRC Section 71(b)(1)(C)] at the time payment is made. (4) The payor must not have any liability to make any such payment (or any substitute for such payment) after the death of the payee and the divorce or separation instrument must state that there is no such liability. [IRC Section 71(b)(2)(B)]. (5) The payment must not be treated as child support. (6) Payments must be made in each year of a defined 6 consecutive post-separation calendar year period in order for annual payments during this period in excess of $10,000 to qualify as alimony or**

**separate maintenance payments. [IRC Section 71(f)(1); IRC Section 71(f)(4)(A).]**

**2. SPECIFIC REQUIREMENTS**

**An alimony or separate maintenance payment is any payment received by or on behalf of a spouse (which for this purpose includes a former spouse) of the payor under a divorce or separation instrument that meets all of the following requirements: [Reg. Section 1.71-IT, Q-2.]**

**(a) The payment is in cash. [Reg. Section 1.71-IT, Q-5.]**

**(b) The payment is not designated as a payment which is excludible from the gross income of the payee and nondeductible by the payor. [Reg. Section 1.71-IT, Q-8.]**

**(c) In the case of spouses legally separated under a decree of divorce or separate maintenance, the spouses are not members of the same household at the time the payment is made. [Reg. Section 1.71-IT, Q-9.]**

**(d) The payor has no liability to continue to make any payment after the death of the payee (or to make any payment as a substitute for such payment) and the divorce or separation instrument states that there is no such liability. [Reg. Section 1.71-IT, Q-10.]**

**(e) The payment is not treated as child support. [Reg. Section 1.71-IT, Q-15.]**

**(f) To the extent that one or more annual payments exceed $10,000 during any of the 6-post-separation years, the payor is obligated to make annual payments in each of the post-separation years. [Reg. Section 1.71-IT, Q-19.]**

**3. CASH PAYMENTS**

**Only cash payments (including checks and money orders payable on demand) qualify as alimony or separate maintenance payments. Transfers of services or property (including a debt instrument of a third party or an annuity contract), execution of a debt instrument by the payor, or the use of property of the payor do not qualify as alimony or separate maintenance payments. [Reg. Section 1.71-IT, Q-5.]**

**Payments of cash to a third party on behalf of a spouse qualify as alimony or separate maintenance payments if the payments are pursuant to the terms of a divorce or separation instrument payment of cash by the payor spouse to a third party under the terms of the divorce or separation instrument will qualify as a payment of cash which is received "on behalf of a spouse". For example, cash payments of rent, mortgage, tax, or tuition liabilities of the payee spouse made under the terms of the divorce or separation instrument will qualify. Any payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments, real estate taxes and insurance premiums) are not payments on behalf of a spouse even if those payments are made pursuant to the terms of the divorce or separation instrument. Premiums paid by the payor spouse for term or whole life insurance on the payor's life made under the terms of the divorce or separation instrument will qualify as payments on behalf of the payee spouse to the extent that the payee spouse is the owner of the policy. [Reg. Section 1.71-IT, Q-6.]**

**Payments of cash to a third party on behalf of a spouse qualify as alimony or separate maintenance payments if the payments are made to the third party at the written request of the payee spouse. For example, instead of making an alimony or separate maintenance payment directly to the payee, the payor spouse may make a cash payment to a charitable organization if such payment is pursuant to the written request, consent or ratification of the payee spouse. Such request, consent or ratification must state that the parties intend the payment to be treated as an alimony or separate maintenance payment to the payee spouse subject to the rules of section 71, and must be received by the payor spouse prior to the date of filing of the payor's first return of tax for the taxable year in which the payment was made. [Reg. Section 1.71-IT, Q-7.]**

**4. OPTING OUT**

**The spouses may designate that payments otherwise qualify as alimony or separate maintenance payments shall be nondeductible by the payor and excludible from gross income by the payee by so providing in a divorce or separation instrument. If the spouses have executed a written separation agreement any writing signed by both spouses which designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludible and which refers to the written separation agreement will be treated as a written separation agreement (and thus a divorce or separation instrument) for the purposes of the preceding sentence. If the spouses are subject to temporary support orders (as described in section 71(b)(2)(C)), the designation of otherwise qualifying alimony or separate payments as nondeductible and excludible must be made in the original or a subsequent temporary support order. A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's first filed return of tax (Form 1040) for each year in which the designation applies. [Reg. Section 1.71-IT, Q-8.]**

**5. SAME HOUSEHOLD**

**Generally, a payment made at the time when the payor and payee spouses are members of the same household cannot qualify as an alimony or separate maintenance payment if the spouses are legally separated under a decree of divorce or of separate maintenance. For purposes of the preceding sentence, a dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the dwelling unit. The spouses will not be treated as members of the same household if one spouse is preparing to depart from the household of the other spouse, and does depart not more than one month after the date the payment is made. If the spouses are not legally separated under a decree of divorce or separate maintenance, a payment under a written separation agreement or a decree described in section 71(b)(2)(C) may qualify as an alimony or separate maintenance payment notwithstanding that the payor and payee are members of the same household at the time the payment is made. [Reg. Section 1.71-IT, Q-9.]**

**6. LIABILITY TO MAKE PAYMENTS AFTER DEATH OF PAYEE**

**Assuming all other requirements relating to the qualification of certain payments as alimony or separate maintenance payments are met, if the payor spouse is required to continue to make the payments after the death of the payee spouse, none of the payments before (or after) the death of the payee spouse qualify as alimony or separate maintenance payments. [Reg. Section 1.71-IT, Q-10.]**

**If the divorce or separation instrument fails to state that there is no liability for any period after the death of the payee spouse to continue to make any payments which would otherwise qualify as alimony or separate maintenance payments, none of the payments, whether made before or after the death of the payee spouse, will qualify as alimony or separate maintenance payments.**

**Example: A is to pay B $10,000 in cash each year for a period of 10 years under a divorce or separation instrument which states that the payments will terminate upon the death of B. In addition, under the instrument, A is to pay B or B's estate $20,000 in cash each year for a period of 10 years. Because the $d20,000 annual payments will not terminate upon the death of B, these payments will not qualify as alimony or separate maintenance payments. However, the separate $10,000 annual payments will qualify as alimony or separate maintenance payments. [Reg. Section 1.71-IT, Q-11.]**

**A divorce or separation instrument will not be treated as stating that there is no liability to make payments after the death of the payee spouse even if the liability to make such payments terminates pursuant to applicable local law or oral agreement. Termination of the liability to make payments must be stated in the terms of the divorce or separation instrument. [Reg. Section 1.71-IT, Q-12.]**

**7. SUBSTITUTE PAYMENTS AFTER DEATH OF PAYEE**

**If the payor spouse is required to make one or more payments (in cash or property) after the death of the payee spouse as a substitute for the continuation of pre-death payments which would otherwise qualify as alimony or separate maintenance payments none of the otherwise qualifying payments will qualify as alimony or separate maintenance payments. The divorce or separation instrument need not state, however, that there is no liability to make any such substitute payment. [Reg. Section 1.71-IT, Q-13.]**

**To the extent that one or more payments are to begin to be made, increase in amount, or become accelerated in time as a result of the death of the payee spouse, such payments may be treated as a substitute for the continuation of payments terminating on the death of the payee spouse which would otherwise qualify as alimony or separate maintenance payments. The determination of whether or not such payments are a substitute for the continuation of payments which would otherwise qualify as alimony or separate maintenance payments, and of the amount of the otherwise qualifying alimony or separate maintenance payments for which any such payments are a substitute, will depend on all of the facts and circumstances.**

**Example: Under the terms of a divorce decree, A is obligated to make annual alimony payments to B of $30,000, terminating on the earlier of the expiration of 6 years or the death of B. B maintains custody of the minor children of A and B. The decree provides that at the death of B, if there are minor children of A and B remaining, A will be obligated to make annual payments of $10,000 to a trust, the income and corpus of which are to be used for the benefit of the children until the youngest child attains the age of majority. These facts indicate that A's liability to make annual $10,000 payments in trust for the benefit of his minor children upon the death of B is a substitute for $10,000 of the $30,000 annual payments to B. Accordingly, $10,000 of each of the $30,000 annual payments to B will not qualify as alimony or separate maintenance payments.**

**Example: Under the terms of a divorce decree, A is obligated to make annual alimony payments to B of $30,000, terminating on the earlier of the expiration of 15 years or the death of B. The divorce decree provides that if B dies before the expiration of the 15 year period, A will pay to B's estate the difference between the total amount that A would have paid had B survived, minus the amount actually paid. For example, if B dies at the end of the 10th year in which payments are made, A will pay to B's estate $150,000 ($450,000 60+21 $300,000). These facts indicate that A's liability to make a lump sum payment to B's estate upon the death of B is a substitute for the full amount of each of the annual $30,000 payments to B. Accordingly, none of the annual $30,000 payments to B will qualify as alimony or separate maintenance payments. The result would be the same if the lump sum payable at B's death were discounted by an appropriate interest factor to account for the prepayment. [Reg. Section 1.71-IT, Q-14.]**

**The 1986 Act repealed the requirement that the divorce or separation instrument must state that the payments terminate upon the death of the payee spouse and local or state law will now govern.**

**8. EXCESS FRONT-LOADING - 1984 RULE**

**The excess front-loading rules are two rules which may apply to the extent that payments in any calendar year exceed $10,000. The first rule is a minimum term rule, which must be met in order for any annual payment, to the extent in excess of $10,000, to qualify as an alimony or separate maintenance payment. This rule requires that alimony or separate maintenance payments be called for, at a minimum, during the 6 "post-separation years". The second rule is a recapture rule which characterizes payments retrospectively by requiring a recalculation and inclusion in income by the payor and deduction by the payee of previously paid alimony or separate maintenance payments to the extent that the amount of such payments during any of the 6 "post-separation years" falls short of the amount of payments during a prior year by more than $10,000. [Reg. Section 1.71-IT, Q-19.]**

**The excess front-loading rules do not apply to payments to the extent that annual payments never exceed $10,000. For example, A is to make a single $10,000 payment to B. Provided that the other requirements of section 71 are met, the payment will qualify as an alimony or separate maintenance payment. If A were to make a single $15,000 payment to B, $10,000 of the payment would qualify as an alimony or separate maintenance payment and $5,000 of the payment would be disqualified under the minimum term rule because payments were not to be made for the minimum period. [Reg. Section 1.71-IT, Q-20.]**

**The 6 "post-separation years" are the 6 consecutive calendar years beginning with the first calendar year in which the payor pays to the payee an alimony or separate maintenance payment (except a payment made under a decree described in section 71(b)(2)(C)). Each year within this period is referred to as a "post-separation year". The 6-year period need not commence with the year in which the spouses separate or divorce, or with the year in which payments under the divorce or separation instrument are made, if no payment during such year qualify as alimony or separate maintenance payments. For example, a decree for the divorce of A and B is entered in October, 1985. The decree requires A to make monthly payments to B commencing November 1, 1985, but A and B are members of the same household until February 15, 1986 (and as a result, the payments prior to January 16, 1986, do not qualify as alimony payments). For purposes of applying the excess front-loading rules to payments from A to B, the 6 calendar years 1986 through 1991 are post-separation years. If a spouse has been making payments pursuant to a divorce or separation instrument described in section 71(b)(2)(A) or (B), a modification of the instrument or the substitution of a new instrument (for example, the substitution of a divorce decree for a written separation agreement) will not result in the creation of additional post-separation years. However, if a spouse has been making payments pursuant to a divorce or separation instrument described in section 71(b)(2)(C), the 6-year period does not begin until the first calendar year in which alimony or separate maintenance payments are made under a divorce or separation instrument described in section 71(b)(2)(A) or (B). [Reg. Section 1.71-IT, Q-22.]**

**9. OPERATION OF THE MINIMUM TERM RULE - 1984 RULE**

**To the extent payments are made in excess of $10,000, a payment will qualify as an alimony or separate maintenance payment only if alimony or separate maintenance payments are to be made in each of the 6 post-separation years. For example, pursuant to a divorce decree, A is to make alimony payments to B of $20,000 in each of the 5 calendar years 1985 through 1989. A is to make no payment in 1990. Under the minimum term rule, only $10,000 will qualify as an alimony payment in each of the calendar years 1985 through 1989. If the divorce decree also required A to make a $1 payment in 1990, the minimum term rule would be satisfied and $20,000 would be treated as an alimony payment in each of the calendar years 1985 through 1989. The recapture rule would, however, apply for 1990. For purposes of determining whether alimony or separate maintenance payments are to be made in any year, the possible termination of such payments upon the happening of a contingency (other than the passage of time) which has not yet occurred is ignored (unless such contingency may cause all or a portion of the payment to be treated as a child support payment). [Reg. Section 1.71-IT, Q-23.]**

**10. OPERATION OF THE RECAPTURE RULE - 1984 RULE**

**If the amount of alimony or separate maintenance payments paid in any post-separation year (referred to as the "computation year") falls short of the amount of alimony or separate maintenance payments paid in any prior post-separation year by more than $10,000, the payor must compute an "excess amount" for the computation year. The excess amount of any computation year is the sum of excess amounts determined with respect to each prior post-separation year. The excess amount determined with respect to a prior post-separation year is the excess of (1) the amount of alimony or separate maintenance payments paid by the payor spouse during such prior post-separation year, over (2) the amount of the alimony or separate maintenance payments paid by the payor spouse during the computation year plus $10,000. For purposes of this calculation, the amount of alimony or separate maintenance payments made by the payor spouse during any post-separation year preceding the computation year is reduced by an excess amount previously determined with respect to such year.**

**The rules set forth above may be illustrated by the following example. A makes alimony payments to B of $25,000 in 1985 and $12,000 in 1986. The excess amount with respect to 1985 that is recaptured in 1986 is $3,000 ($25,000 60+21 ($12,000 60+20 $10,000)). For purposes of subsequent computation years, the amount deemed paid in 1985 is $22,000. If A makes alimony payments to B of $1,000 in 1987, the excess amount that is recaptured in 1987 will be $12,000. This is the sum of an $11,000 excess amount with respect to 1985 ($22,000 60+21 ($1,000 60+20 $10,000)) and a $1,000 excess amount with respect to 1986 ($12,000 60+21 ($1,000 60+20 $10,000)). If, prior to the end of 1990, payments decline further, additional recapture will occur. The payor spouse must include the excess amount in gross income for his/her taxable year beginning with or in the computation year. The payee spouse is allowed a deduction for the excess amount in computing adjusted gross income for his/her taxable year beginning with or in the computation year. However, the payee spouse must compute the excess amount by reference to the date when payments were made and not when payments were received. [Reg. Section 1.71-IT, Q-24.]**

**11. EXCEPTIONS TO THE RECAPTURE RULE - 1984 RULE**

**There are three exceptions to the recapture rule. The first exception is for payments received under a family court support order or temporary support orders described in section 71(b)(2)(C). The second exception is for any payment made pursuant to a continuing liability over the period of the post-separation years to pay a fixed portion of the payor's income from a business or property or from compensation for employment or self-employment. The third exception is where the alimony or separate maintenance payments in any post-separation year cease by reason of the death of the payor or payee or the remarriage (as defined under applicable local law) of the payee before the close of the computation year.**

**For example, pursuant to a divorce decree, A is to make cash payments to B of $30,000 in each of the calendar years 1985 through 1990. A makes cash payments of $30,000 in 1985 and $15,000 in 1986, in which year B remarries and A's alimony payments cease. The recapture rule does not apply for 1986 or any subsequent year. If alimony or separate maintenance payments made by A decline or cease during a post-separation year for any other reason (including a failure by the payor to make timely payments, a modification of the divorce or separation instrument, a reduction in the support needs of the payee, or a reduction in the ability of the payor to provide support) excess amounts with respect to prior post-separation years will be subject to recapture. [Reg. Section 1.71-IT, Q-25.]**

**12. EFFECTIVE DATES - 1984 AMENDMENTS**

**Generally, section 71, as amended, is effective with respect to divorce or separation instruments (as defined in section 71(b)(2)) executed after December 31, 1984. If a decree of divorce or separate maintenance executed after December 31, 1984, incorporates or adopts without change the terms of the alimony or separate maintenance payments under a divorce or separation instrument executed before January 1, 1985, such decree will be treated as executed before January 1, 1985. A change in the amount of alimony or separate maintenance payments or the time period over which such payments are to continue, or the addition or deletion of any contingencies or conditions relating to such payments is a change in the terms of the alimony or separate maintenance payments.**

**For example, in November 1984, A and B executed a written separation agreement. In February 1985, a decree of divorce is entered in substitution for the written separation agreement. The decree of divorce does not change the terms of the alimony A pays to B. The decree of divorce will be treated as executed before January 1, 1985 and hence alimony payments under the decree will be subject to the rules of section 71 prior to amendment by the Tax Reform Act of 1984. If the amount or time period of the alimony or separate maintenance payments are not specified in the pre-1985 separation agreement or if the decree of divorce changes the amount or term of such payments, the decree of divorce will not be treated as executed before January 1, 1985, and alimony payments under the decree will be subject to the rules of section 71, as amended by the Tax Reform Act of 1984.**

**Section 71, as amended, also applies to any divorce or separation instrument executed (or treated as executed) before January 1, 1985 that has been modified on or after January 1, 1985, if such modification expressly provides that section 71, as amended by the Tax Reform Act of 1984, shall apply to the instrument as modified. In this case, section 71, as amended, is effective with respect to payments made after the date the instrument is modified. [Reg. Section 1.71-IT, Q-26.]**

**13. EXCESS FRONT-LOADING - 1986 AMENDMENTS**

**The 1984 Act enacted the "excess front-loading" rules, two rules which could apply to payments that exceed $10,000 in any calendar year. The first rule was a "minimum term" rule, which had to be met in order for any annual payment, to the extent it was in excess of $10,000, to qualify as an alimony or separate maintenance payment. This rule, required that alimony or separate maintenance payments be called for, at a minimum, during the 6 "post-separation years".**

**The second rule was a "recapture rule" which characterized payments retrospectively by requiring a recalculation and inclusion in income by the payor and deduction by the payee of previously paid alimony or separate maintenance payments to the extent that the amount of such payments during any of the six "post-separation years" fell short of the amount of payments during a prior year by more than $10,000. The minimum term rule has been eliminated in the 1986 Act.**

**14. THE 1986 RECAPTURE RULE**

**The six year recapture rule, enacted in 1984 has been replaced by a three year rule, with a higher, $15,000 exemption and now the recapture will only take place in the third year.**

**If the alimony payments in the first year exceed the average of the payments made in the second and third year by more than $15,000, the excess amounts are recaptured in the third year by requiring the payor to include the excess in income and allowing the payee, who previously included the alimony in income, a deduction for that amount in computing adjusted gross income. A similar rule applies to the extent the payments in the second year exceed the payments in the third year by more than $15,000. This rule is intended to prevent persons whose divorce occurs near the end of the year from making a deductible property settlement at the beginning of the next year. Recapture is not required if either party dies or if the payee spouse remarries by the end of the calendar year which is two years after the payments began and payments cease by reason of that event. Also the rule does not apply to temporary support payments (described in Sec. 71(b)(2)(C) or to payments which fluctuate as a result of a continuing liability to pay, for at least three years, a fixed portion or portions of income from the earnings of a business, property or services.**

**Under the new rule, if there are "Excess Alimony Payments", they are included in the gross income of the payor spouse beginning in the "third post-separation year" and allowed as a deduction to the recipient spouse, in computing his or her adjusted gross income, beginning in the third post separation year.**

**"Excess alimony payments" mean the total of the "excess payments" made in both the first and second post-separation years. The "first post-separation year" is the first calendar year in which the payor spouse actually pays to the payee spouse alimony or separate maintenance payments. The second and third post separation years are the first and second succeeding calendar years. Thus, the three post-separation years can actually be on a period as short as one year and two days, (i.e., one payment on the last day of the year one and one payment on the first day of year 3).**

**"Excess payments" for the "first post-separation year" would be the excess of (1) the amount of the alimony or separate maintenance payments paid by the payor spouse during the first post-separation year, over the sum of the average of (2) the alimony or separate maintenance payments paid by the payor spouse during the second post-separation year, reduced by the excess payments for the second post-separation year, and the alimony or separate maintenance payment paid by the payor spouse during the third post-separation, plus $15,000.**

**"Excess payments" for the "second post-separation year" would be the excess of (1) the amount of the alimony or separate maintenance payments paid by the payor spouse during the second post-separation year, over the sum of the amount of the alimony or separate maintenance payments paid by the payor spouse during the "third post-separation year", plus $15,000.**

**For example (example #1) if the payor makes alimony payments of $50,000 in the first year and no payments in the second or third year, $35,000 will be recaptured (assuming none of the exceptions apply). If (example #2) the payments are $50,000 in the first year, $20,000 in the second year and nothing in the third year, the recapture amount will consist of $5,000 from the second year (the excess over $15,000) plus $27,500 for the first year (the excess of $50,000 over the sum of $15,000 plus $7,500). (The $7,500 is the average payments for the years two and three after reducing the payments by the $5,000 recaptured from year two.)**

**15. EXCEPTIONS TO THE 1986 RECAPTURE RULE**

**There are three exceptions to the recapture rule. The first exception is for payments received under a family court support order or temporary support orders described in section 71(b)(2)(C). The second exception is for any fluctuating payment made pursuant to a continuing liability for at least three years to pay a fixed portion of the payor's income from a business or property or from compensation for employment or self-employment. The third exception is where the alimony or separate maintenance payments in any post-separation year cease by reason of the death of the payor or payee or the remarriage (as defined under applicable local law) of the payee before the close of the third post-separation year.**

**For example, pursuant to a divorce decree, A is to make cash payments to B of $30,000 in each of the calendar years 1987 through 1990. A makes cash payments of $30,000 in 1987 and $15,000 in 1988, in which year B remarries and A's alimony payments cease. The recapture rule does not apply for 1986 or the subsequent year. However, if A did not remarry and if alimony or separate maintenance payments made by A decline or cease during a post-separation year for any other reason (including a failure by the payor to make timely payments, a modification of the divorce of separation instrument, a reduction in the support needs of the payee, or a reduction in the ability of the payor to provide support) excess amounts with respect to prior post-separation years will be subject to recapture. But if A reduces his support in the second year because of his inability to pay, under the averaging rule, he can make up the difference in the third year and will not be subject to recapture.**

**16. EFFECTIVE DATES - 1986 AMENDMENTS**

**The 1986 Act recapture rules apply to divorce or separation instruments that are executed after December 31, 1986. These rules can also apply to instruments executed before January 1, 1987, if the instrument is modified after that date and the modification expressly provides that the three-year recapture rules apply.**

**A transitional rule provides that for divorce and separation instruments which were executed before 1987 and are not modified, the three-year recapture rules are applicable. For these instruments, the six-year recapture provisions that were in effect immediately prior to the enactment of the Tax Reform Act of 1986 are to apply only with respect to the first three post-separation years.**

**17. CHILD SUPPORT - IN GENERAL**

**The general rule as to child support is that payments fixed in the divorce or separation instrument as child support are not deductible by the payor and not included in the recipient's gross income. [IRC Section 71(c).] The 1984 act overrules the decision in Commissioner v. Lester which held that where an instrument does not state a specific amount that is payable only for child support, no portion of the payments under the instrument may be treated as child support. The law now provides that if a payment specified in the divorce or separation instrument will be reduced on the happening of a contingency specified in the instrument relating to a child, of the payor spouse such as attaining a specified age, marrying, dying, leaving school, or a similar contingency, or at a time which can be clearly associated with a contingency of the foregoing kind, an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of the children of the payor spouse. [IRC Section 71(c)(2).] Spouse includes a former spouse. [IRC Section 71(d).] The section does not apply if the spouses file a joint return with each other. [IRC Section 71(e).]**

**The1984 act continues the rule that all payments are first applied to child support. If any payment is less than the amount specified in the instrument, then so much of the payment as does not exceed the sum payable for child support is considered a payment for child support. [IRC Section 71(c)(3).]**

**18. EFFECTIVE DATE - 1984 AMENDMENT**

**The amendments contained in section 422 as to child support are applicable to divorce and separation instruments executed after December 31, 1984, and to any divorce or separation instrument executed before January 1, 1984, but modified on or after such date, if the modification expressly provides that the amendments made by section 422 apply to the modification. [Act Section 422(a).]**

**19. CHILD SUPPORT - TREATMENT OF PAYMENTS AS FIXED FOR CHILD SUPPORT**

**A payment which under the terms of the divorce or separation instrument is fixed (or treated as fixed) as payable for the support of a child of the payor spouse does not qualify as an alimony or separate maintenance payment and is not deductible by the payor spouse or includible in the income of the payee spouse.**

**A payment is fixed as payable for the support of a child of the payor spouse if the divorce or separation instrument specifically designates some sum or portion (which sum or portion may fluctuate) as payable for the support of a child of the payor spouse. A payment will be treated as fixed as payable for the support of a child of the payor spouse if the payment is reduced (a) on the happening of a contingency relating to a child of the payor, or (b) at a time which can clearly be associated with such a contingency. A payment may be treated as fixed as payable for the support of a child of the payor spouse even if other separate payments specifically are designated as payable for the support of a child of the payor spouse. [Reg. Section 1.152-IT, Q-16.]**

**A contingency relates to a child of the payor if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to a child of the payor include the following: the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment. [Reg. Section 1.152-IT, Q-17.]**

**The regulations provide that there are two situations, described below, in which payments which would otherwise qualify as alimony or separate maintenance payments will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor. In all other situations, reductions in payments will not be treated as clearly associated with the happening of a contingency relating to a child of the payor. [Reg. Section 1.152-IT, Q-18.]**

**The first situation is where the payments are to be reduced not more than 6 months before or after the date the child is to attain the age of 18, 21, or local age of majority. The second situation is where the payments are to be reduced on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child, but need not be a whole number of years.**

**The presumption in the two situations described above that payments are to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor may be rebutted (either by the Service or by taxpayers) by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. The presumption in the first situation will be rebutted conclusively if the reduction is a complete cessation of alimony or separate maintenance payments during the sixth post-separation year or upon the expiration of a 72-month period. The presumption may also be rebutted in other circumstances, for example, by showing that alimony payments are to be made for a period customarily provided in the local jurisdiction, such as a period equal to one-half the duration of the marriage.**

**Example: A and B are divorced on July 1, 1985, when their children, C (born July 15, 1970) and D (born September 23, 1972), are 14 and 12 respectively. Under the divorce decree, A is to make alimony payments to B of $2,000 per month. Such payments are to be reduced to $1,500 per month on January 1, 1991 and to $1,000 per month on January 1, 1995. On January 1, 1991, the date of the first reduction in payments, C will be 20 years 5 months and 17 days old. On January 1, 1995, the date of the second reduction in payments, D will be 22 years 3 months and 9 days old. Each of the reductions in payments is to occur not more than one year before or after a different child of A attains the age of 21 years and 4 months. (Actually, the reductions are to occur not more than one year before or after C and D attain any of the ages 21 years 3 months and 9 days through 21 years 5 months and 17 days.) Accordingly, the reductions will be presumed to clearly be associated with the happening of a contingency relating to C and D. Unless this presumption is rebutted, payments under the divorce decree equal to the sum of the reductions ($1,000 per month) will be treated as fixed for the support of the children of A and therefore will not qualify as alimony or separate maintenance payments.**

**20. CHILD SUPPORT - 1986 AMENDMENT**

**The 1986 Amendments to the Internal Revenue Code made a clerical amendment to IRC 72(c)(2), so that it now provides that if a payment specified in the divorce or separation instrument will be reduced on the happening of a contingency specified in the instrument relating to a child, of the payor spouse such as attaining a specified age, marrying, dying, leaving school, or a similar contingency or at a time which can be clearly associated with a contingency of a kind specified in IRC 72(c)(2)(A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of the children of the payor spouse.**

**21. Reporting Requirements; Alimony and Maintenance Payments.**

**A spouse who is making alimony or separate maintenance payments and seeks a tax deduction for such payments must include on his first filed tax return for the taxable year in which the payment is made the other spouse's social security number, which the payee spouse is required to furnish the payor. If the payee spouse fails to timely furnish his social security number to the payor spouse or if the payor spouse fails to timely include the number on his income tax return, a $50 penalty per failure will apply, unless it is shown that such failure is due to reasonable cause and not to willful neglect. 1984 Act, $ 422(b); 26 CFR, Part 1, amending $$ 215 and 6676(c); IRC $ 215.6723 and 6724; Temp Reg $ 301.6723-IT(a)(iii).**

**Moreover, the alimony deduction may be disallowed to the payor spouse who fails to include the payee's social security number on his income tax return. IRC $ 215; Temp Reg $ 1.215-IT.**